FILE COPY

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1945

FILED
FEB 4 1946
CHARLES ELMORE CROPLEY

No. [redacted] 25

UNEMPLOYMENT COMPENSATION COMMISSION OF THE TERRITORY OF ALASKA, NOBLE DICK, R. E. HARDCASTLE and R. S. BRAGAW, as Members of and Constituting said Commission, and ALASKA PACKERS ASSOCIATION, a corporation, ALASKA SALMON COMPANY, a corporation, and RED SALMON CANNING COMPANY, a corporation,

Petitioners,

vs.

FRANK L. ARAGON and Other Applicants, Members of Alaska Cannery Workers Union Local No. 5, and ALASKA CANNERY WORKERS UNION LOCAL NO. 5 on Behalf of Applicants,

Respondents.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF FOR PETITIONERS.

E. COKE HILL,
Hobart Building, San Francisco 4, California,
Attorney for Alaska Unemployment Compensation Commission.

MARSHALL P. MADISON,
FRANCIS R. KIRKHAM,
MELVIN E. MENSOR,
Standard Oil Building, San Francisco 4, California
H. L. FAULKNER,
Juneau, Alaska
Attorneys for Alaska Packers Association, Alaska Salmon Company and Red Salmon Canning Company

Table of Contents

	Page
Opinions Below	2
Jurisdiction	2
Statute Involved	2
Statement of the Case	3
Specifications of Errors to be Urged	9
Summary of Argument	11
Argument	13
I. Questions of the specific application of broad statutory terms to particular facts, in a proceeding in which the agency administering the statute must determine such questions initially, are to be determined by the administrative agency, and its determination is conclusive upon the reviewing court if the term under consideration has no unvarying legal significance and there is a rational basis for the administrative determination	13
II. The determination of the Alaska Unemployment Compensation Commission is warranted by the record and has a reasonable basis in law	17
A. The statute and the proceedings	17
B. There was a labor dispute	20
C. The dispute was in active progress at the establishment at which respondents were last employed for the period of disqualification fixed by the Commission	21
D. The respondents' unemployment was due to a labor dispute	27
III. The grounds upon which the Circuit Court of Appeals based its decision are untenable	28
A. The decision fails to recognize that the determination of the Commission should be followed if it is warranted by the record before the Commission and has a reasonable basis in law	28

Page

B. The Circuit Court of Appeals erred in reversing the District Court and the Commission upon a ground not raised before the Commission, the District Court or the Circuit Court of Appeals... 37

C. In any event, the function of the Circuit Court of Appeals in this case is limited to returning the case to the Commission for further proceedings.. 44

Conclusion 46

Appendix i

Table of Authorities Cited

Cases	Pages
Barnes v. Hall, 285 Ky. 160, 146 S. W. (2d) 929	16
Block Coal & Coke Co. v. United Mine Workers, Etc., 177 Tenn. 364, 148 S. W. (2d) 364	17, 34, 35
Board v. Hearst Publications, 322 U. S. 111	13
Chrysler Corporation v. Smith, 297 Mich. 438, 298 N. W. 87	30
Dallas Fuel Co. v. Horne, 230 Iowa 1148, 300 N. W. 303	17, 34
Denver Stock Yard Co. v. U. S., 304 U. S. 470	45
Department of Industrial Relations v. Pesnell, 29 Ala. App. 528, 199 So. 720, aff'd Ex parte Pesnell, 240 Ala. 457, 199 So. 726, cert. den. 313 U. S. 590	16, 34
Deshler Broom Factory v. Kinney, 140 Neb. 889, 2 N. W. (2d) 332	17
Ex parte Pesnell, 240 Ala. 457, 199 So. 726, cert. den. 313 U. S. 590, affirming Department of Industrial Relations v. Pesnell, 29 Ala. App. 528, 199 So. 720	16
Gray v. Powell, 314 U. S. 402	13, 14
Helvering v. Wood, 309 U. S. 344	45
In re North River Logging Co., 15 Wash. (2d) 204, 130 P. (2d) 64	17
Johnson v. Pratt, 200 S. C. 315, 20 S. E. (2d) 865	17
Koski, et al. v. UCC, et al., C.C.H. Unemployment Insurance Service, Oregon, par. 8046	33
Latham v. State Unemployment Compensation Com'n, 167 Ore. 371, 117 P. (2d) 971	17
Miners in General Group v. Hix, 17 S. E. (2d) 810	16, 34
Moore et al. v. Board of Review, C.C.H. Unemployment Insurance Service (W. Va.), par. 1980.01	17, 34
New Jersey Board of Review Decision No. BR-52L, C.C.H. Unemployment Insurance Service (N. J.), par. 1980.03	17

Pages

Pennsylvania Board of Review Decision No. B-44-6-RG-503, C.C.H. Unemployment Insurance Service (Pa.), pars. 1980.013, 1980.019 17
Phelps Dodge Corp. v. Labor Board, 313 U. S. 177 44

Regal Knitwear Co. v. Board, 324 U. S. 9 44
Rochester Tel. Corp. v. U. S., 307 U. S. 125 ..... 13, 14

Sandoval v. Industrial Commission, 110 Colo. 108, 130 P. (2d) 930 ..... 17, 34
South Chicago Co. v. Bassett, 309 U. S. 251 ..... 13, 14, 29

U. S. v. Northern Pacific Ry. Co., 311 U. S. 317 45

Walter Bledsoe Coal Co. v. Review Board, Etc., 46 N. E. (2d) 477 ..... 17, 34

Statutes and Regulations

Alaska Unemployment Compensation Law (Alaska Statutes, chapter 4, Extraordinary Session Laws of 1937 as amended by chapters 1 and 51, Session Laws, 1939) 2, 6, 10, 17, 19, 20, 26, 35, 36, 44, 45
Sec. 3(c) 4
Sec. 5(d) 5, 11, 16, 18, 36, 40
Sec. 6(b) 19
Sec. 6(c) 6, 19
Sec. 6(d) 6, 19
Sec. 6(e) 19
Sec. 6(h) 7
Sec. 6(i) 7, 19, 21
Alaska Unemployment Compensation Commission Benefit Regulation No. 10 4

Internal Revenue Code, 26 U.S.C. 1600-1611 36

Judicial Code, sec. 240(a), as amended by the Act of February 13, 1925 (28 U.S.C. 347) 2

National Labor Relations Act, 29 U.S.C., sec. 152(9) 13, 20

Norris-LaGuardia Act, 29 U.S.C., sec. 113(c) 20

Social Security Act, 49 Stat. 620 36

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1945

No. 309

UNEMPLOYMENT COMPENSATION COMMISSION OF THE TERRITORY OF ALASKA, NOBLE DICK, R. E. HARDCASTLE and R. S. BRAGAW, as Members of and Constituting said Commission, and ALASKA PACKERS ASSOCIATION, a corporation, ALASKA SALMON COMPANY, a corporation, and RED SALMON CANNING COMPANY, a corporation,

Petitioners,

vs.

FRANK L. ARAGON and Other Applicants, Members of Alaska Cannery Workers Union Local No. 5, and ALASKA CANNERY WORKERS UNION LOCAL No. 5 on Behalf of Applicants,

Respondents.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF FOR PETITIONERS.

OPINIONS BELOW.

The decision and opinion of the Referee appointed by the Unemployment Compensation Commission is at R. 608-643. The decision of the Commission is at R. 644-649. The opinion (R. 692-710) and findings of fact and conclusions of law (R. 711-718) of the District Court are not reported. The opinion of the Circuit Court of Appeals (R. 770-788) and the dissenting opinion of Judge Healy (R. 788-793) are reported in 149 F. (2d) 447.

JURISDICTION.

The decree of the Circuit Court of Appeals was entered May 15, 1945 (R. 793-794). The petition for a writ of certiorari was filed August 10, 1945. Jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U.S.C. 347).

STATUTE INVOLVED.

Section 5(d) of the Alaska Unemployment Compensation Law (Alaska Statutes, Chapter 4, Extraordinary Session Laws of 1937, as amended by Chapters 1 and 51, Session Laws of 1939) provides:

> "*Disqualification for Benefits.* An individual shall be disqualified for benefits:
>
> * * * * * * *
>
> (d) For any week with respect to which the Commission finds that his total or partial unemployment is due to a labor dispute which is in active progress at the factory, establishment or other premises at which he is or was last employed: provided that such

disqualification shall not exceed the 8 weeks immediately following the beginning of such dispute; * * *"

Other pertinent provisions of the Alaska Act are copied in the appendix to this brief.

STATEMENT OF THE CASE.

Alaska Packers Association, Alaska Salmon Company and Red Salmon Canning Company (hereinafter called "employers") operate salmon canneries in Chignik, Karluk and Bristol Bay, Alaska. The individual respondents are salmon cannery workers, hired out of San Francisco, who were employed by employers during the 1939 season (R. 646, 712). Respondent, Alaska Cannery Workers Union, Local No. 5, is the bargaining agent of the individual respondents (R. 712).

In 1939, as had been the practice in previous years (R. 713-714), employers entered into an agreement with respondent union for the employment of men in the 1939 Alaska operations (R. 714). After the close of the 1939 season this agreement was terminated (R. 714), and thereafter negotiations commenced at San Francisco looking toward the execution of an agreement covering the 1940 operations (R. 714, 165, 262-263, 610). Employers were represented by Alaska Salmon Industry Inc., a corporation organized to handle labor negotiations of the salmon industry on the Pacific Coast (R. 260-261). The employees were represented by the union. Controversy arose. The union demanded increased wages and other working conditions more favorable than those provided in the 1939

agreement (R. 317, 614, 714). The employers, having suffered losses during the preceding year, proposed reductions (R. 243-244, 572, 615).

In Alaska the fishing and canning industry is seasonal. The seasonal periods for the three localities here involved, as fixed by the Commission pursuant to the provisions of Section 3(c) of the Alaska Act,[1] are: At Karluk from April 5 to September 5; at Chignik from April 1 to September 10, and at Bristol Bay from May 5 to August 5.[2] As negotiations continued the time approached when the expeditions would have to leave. On April 3 the employers notified the union that if operations were to be carried on at Karluk it would be necessary to reach an agreement by April 10; and if operations were to be carried on at Chignik it would be necessary to reach an agreement by April 12.

In the meantime, the union notified the employers that further negotiations (on all but certain subsidiary matters) would be carried on at Seattle (R. 321-322). The employers concurred and their representatives continued negotiations in both San Francisco and Seattle (R. 333, 339-340). Proposals and counter proposals continued but the parties were unable to settle their dispute and the respective deadlines for Karluk and Chignik came and passed with no agreement reached.[3]

---

[1]Appendix, p. ii.

[2]Benefit regulation No. 10, R. 199, 201. Karluk is on Kodiak Island, and Chignik on the Alaska Peninsula, both on the Pacific side of the Alaska Peninsula. Bristol Bay is on the northern side of the Peninsula, opening into the Bering Sea.

[3]The negotiations and the matters which were the subject of the dispute are summarized in the findings of the Referee (R. 613-627), and in the opinion (R. 697-699), and findings (R. 713-716) of the District Court.

Further meetings were held in an effort to agree on terms for work at Bristol Bay (R. 372-377), and on April 26 the employers notified the union that unless agreements could be reached by May 3 no expedition to Bristol Bay could be undertaken (R. 378). As this day approached further communications were sent by the employers urging that negotiations be concluded (R. 382-393e); meetings were held; definite and unqualified written proposals were made by the employers (R. 393e, 395-491); federal officials offered their services in an attempt to bring about an agreement and participated in meetings (R. 236, 499-502). The dispute continued, however, and the deadline for Bristol Bay came and passed.

Negotiations continued at Seattle and numerous meetings were held at least as late as May 29, when an agreement was finally reached as to workers out of Portland and Seattle, but expressly excluding workers out of San Francisco.[4]

Immediately after May 3—the last deadline date—and prior to the conclusion of the Seattle negotiations, respondents filed claims with petitioner, the Unemployment Compensation Commission of Alaska, for unemployment compensation. The Commission held respondents disqualified for benefits for the statutory period of eight weeks, under the provisions of Section 5(d) of the Alaska Act, supra.

Respondents asked for a hearing, asserting that they were not engaged in, and their unemployment was not due to, a labor dispute (R. 3, 4-5). A hearing on these issues

[4] R. 614-615, 627, 84-86, 90-94, 98-102, 141, 190-191, 339-341, 503.

was granted and held before a Referee appointed by the Commission (R. 25-608).[5]

At the hearing respondents contended that no "labor dispute" within the meaning of the Act existed, because the situation was one where the employers simply refused to negotiate an agreement, or where the parties simply failed to arrive at a contract; that the employer-employee relationship terminated at the close of the 1939 season and no labor dispute can exist without the interruption by strike or work stoppage of an existing employer-employee relationship; that if a labor dispute existed, it was not "in active progress" after the respective deadline dates, since the dispute ended on those dates; and that, finally, respondents' unemployment was not "due" to the dispute, because the employers did not negotiate in good faith but intended to, and did, abandon their operations for reasons other than the labor dispute (R. 29-30, 202-203, 204-205, 612).

The Referee found that "There is no evidence to support the Union's contention that the Employers acted in bad faith in the course of the negotiations" (R. 628); that "All operations contemplated by the Employers and the Union for 1940 were abandoned for the reason that a mutually satisfactory working agreement was not negotiated by the dates set by the Employers, as the 'deadline' for the respective districts" (R. 633); that "A fair consideration of all the evidence submitted leaves no escape from the conclusion that a labor dispute existed and was in active progress between the Employers and the

[5]This was in accordance with Section 6(c) and (d) of the Alaska Act, Appendix, p. iv.

Union up to the expiration of the dates fixed by the Employers for the consummation of the working agreements for the respective plants" (R. 638); but that "the labor dispute ceased to be in active progress," as to the three districts, upon the expiration of the respective "deadline dates," since, upon those dates, "the dispute which had raged between [the Employers] and the Union" came to an end (R. 640). Accordingly, the Referee ordered that compensation be denied from the opening of the season up to the respective deadline dates, but be allowed for the balance of the season (R. 642-643).

Respondents, satisfied with this decision, did not appeal (R. 645). The employers appealed to the full Commission (R. 645). The Commission reversed the Referee and affirmed its initial determination, holding that a labor dispute existed and continued during the disqualification period, and that respondents' unemployment was due to that dispute (R. 644-649). Compensation accordingly was allowed, to commence after the expiration of eight weeks (R. 649).

The respondents petitioned for review in the District Court in accordance with the provisions of section 6(h) and (i) of the Alaska Act,[6] repeating the contentions they had made before the Referee. The District Court overruled these contentions and affirmed the findings and conclusions of the Commission (R. 692-718).

Respondents appealed, raising identically the same contentions.[7]

---

[6]Appendix, pp. v-vi.

[7]The assignment of errors in the Circuit Court of Appeals (R. 722-745), except for minor and unsubstantial differences, is a copy of the petition for review in the District Court (R. 650-672).

The Circuit Court of Appeals gave no consideration to any point raised in that court or raised in the tribunals below. Instead it reversed the judgment upon the volunteered ground that the statutory language, "an individual shall be disqualified for benefits * * * for any week * * * that his * * * unemployment is due to a labor dispute which is in active progress at the factory * * * at which he is or was last employed," requires that the actual negotiations must be physically conducted on the premises of the factory at which the employee was last employed in order for the disqualification to apply (R. 774-777). It further held that the respondents were disqualified for the period commencing with the start of the fishing season at Karluk and Chignik and ending on the day of the deadline imposed by the employers, because respondents had not appealed from the Referee's decision which disqualified them for such period on the theory that the dispute existed and continued in active progress until the deadline dates (R. 781).

The Circuit Court of Appeals went further. It devoted more than nine pages of its opinion (R. 778-787) to a statement that the point upon which it decided the case was in fact raised and considered "throughout the litigation" (R. 786).

Judge Healy dissented (R. 788-793). He pointed out that the ground of decision was "volunteered" by the majority of the court (R. 788); that "Unless we choose to misunderstand we can not mistake the propositions of law and fact upon which review of the Commission's determination was sought" (R. 790). He expressed the further views (R. 791-793):

"This case is not one originally cognizable by the court. It is purely a review proceeding. The act provides [Section 6(h)] that judicial review of a decision 'shall be permitted only if any party claiming to be aggrieved thereby has exhausted his administrative remedies.' I think it is clear that no issue may be urged on review that was not squarely presented to the Commission. The court, no less than the parties, is foreclosed from injecting issues not so presented. Yet this court has not only done that, it has decided the spurious issue without benefit of argument on the part of counsel, and without giving the Commission an opportunity to be heard.

* * * * * * * *

Being of the belief that the question made the basis of the majority decision is not properly before us, I refrain from discussing it beyond saying that it distorts the statutory policy and ignores the actualities of this seasonal operation. * * * The findings of the Commission on the questions actually presented to it are supported by evidence, and I see no sufficient reason for disturbing the administrative decision."

SPECIFICATIONS OF ERRORS TO BE URGED.

1. The Circuit Court of Appeals erred in holding that the question decided by it was raised before and considered by the Commission and the District Court, and was raised in the Circuit Court of Appeals.

2. The Circuit Court of Appeals erred in stating that said question was raised before and considered by the Commission and the District Court, and was raised in the Circuit Court of Appeals, and, in so ruling, so far de-

parted from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

3. The Circuit Court of Appeals erred in reversing the decree of the District Court and the findings and decision of the Alaska Unemployment Compensation Commission upon a ground not raised in, or considered by, the Commission or the District Court.

4. The Circuit Court of Appeals, in reversing the findings and decision of the Commission upon a ground not raised in or considered by the Commission, erred in that it failed to give effect to the requirement of the Alaska Act, and of the general law, that parties shall exhaust their administrative remedies before resort to the Court, and to the requirements of the Alaska Act that the determination whether claims are properly payable under the Act shall be first made by the Commission, and that the hearing in Court shall be confined to "review" of the Commission's decision.

5. The Circuit Court of Appeals, in reversing the findings and decision of the Commission upon the ground that the dispute was not "at the factory, establishment or other premises" at which respondents were last employed, erred in that it failed to give effect to the rule that an administrative finding, if it has warrant in the facts of record and a reasonable basis in law, is conclusive upon the Court on review.

6. The Circuit Court of Appeals erred in failing to hold that the Commission's findings were supported by

the evidence and had a reasonable basis in law and were, therefore, conclusive upon the Court on review.

7. The Circuit Court of Appeals erred in holding that the disqualification provided in Section 5(d) of the Alaska Act is not applicable unless the labor dispute physically takes place at the particular factory, establishment or other premises at which the particular claimant was last employed.

8. The Circuit Court of Appeals erred in failing to affirm the decision of the District Court which sustained the findings and decision of the Commission.

SUMMARY OF ARGUMENT.

I. Questions of the specific application of broad statutory terms to particular facts, in a proceeding in which the agency administering the statute must determine such questions initially, are to be determined by the administrative agency, and its determination is conclusive upon the reviewing Court if the term under consideration has no unvarying legal significance and there is a rational basis for the administrative determination.

II. The determination of the Alaska Unemployment Compensation Commission is warranted by the record and has a reasonable basis in law.

A. The statute and the proceedings.

B. There was a labor dispute.

C. The dispute was in active progress at the establishment at which respondents were last employed for the period of disqualification fixed by the Commission.

D. The respondents' unemployment was due to a labor dispute.

III. The grounds upon which the Circuit Court of Appeals based its decision are untenable.

A. The decision fails to recognize that the determination of the Commission should be followed if it is warranted by the record before the Commission and has a reasonable basis in law.

B. The Circuit Court of Appeals erred in reversing the District Court and the Commission upon a ground not raised before the Commission, the District Court or the Circuit Court of Appeals.

C. In any event, the function of the Circuit Court of Appeals in this case is limited to returning the case to the Commission for further proceedings.

ARGUMENT.

I.

QUESTIONS OF THE SPECIFIC APPLICATION OF BROAD STATUTORY TERMS TO PARTICULAR FACTS, IN A PROCEEDING IN WHICH THE AGENCY ADMINISTERING THE STATUTE MUST DETERMINE SUCH QUESTIONS INITIALLY, ARE TO BE DETERMINED BY THE ADMINISTRATIVE AGENCY, AND ITS DETERMINATION IS CONCLUSIVE UPON THE REVIEWING COURT IF THE TERM UNDER CONSIDERATION HAS NO UNVARYING LEGAL SIGNIFICANCE AND THERE IS A RATIONAL BASIS FOR THE ADMINISTRATIVE DETERMINATION.

The proposition stated in the above heading has become well established.

Board v. Hearst Publications (1944), 322 U. S. 111; 130, 132;

Gray v. Powell (1941), 314 U. S. 402, 411-413;

Rochester Tel. Corp. v. U. S. (1939), 307 U. S. 125, 144-146;

South Chicago Co. v. Bassett (1940), 309 U. S. 251, 257-258.

In the *Hearst* case the administrative tribunal had determined that newsboys were "employees" within the meaning of the National Labor Relations Act. This finding having "warrant in the record" and a "reasonable basis in law" was held to be conclusive. The Court pointed out that the determination of such questions belongs to the usual administrative routine of the Board, and that (322 U. S. 131)

> " * * * where the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function

> is limited. Like the commissioner's determination under the Longshoremen's & Harbor Workers' Act, that a man is not a 'member of a crew' * * * or that he was injured 'in the course of his employment' * * *; and the Federal Communications Commission's determination that one company is under the 'control' of another * * *, the Board's determination that specified persons are 'employees' under this Act is to be accepted if it has 'warrant in the record' and a reasonable basis in law."

In the *Rochester Telephone* case the Commission had found that one company was under the "control" of another. This Court pointed out that a finding whether control exists depends upon the facts of each case; that (307 U. S. 145-146):

> "So long as there is warrant in the record for the judgment of the expert body it must stand * * * 'The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body.'"

In the *South Chicago* case the question was whether the employee was a member of a "crew." The Court held that the determination of that question had been confided in the Deputy Commissioner. It rejected the contention that the question was purely one of law upon undisputed facts, pointing out that "The word 'crew' does not have an absolutely unvarying legal significance."

In *Gray v. Powell* the question was whether one of the parties was a "producer" of coal within the meaning of the statute. This Court held that the determination of that issue had been vested by the Congress in the adminis-

trative body, and that its determination was conclusive upon the courts so long as it rested upon a rational basis (314 U. S. 411-413):

> "Such a determination as is here involved belongs to the usual administrative routine. Congress, which could have legislated specifically as to the individual exemptions from the code, found it more efficient to delegate that function to those whose experience in a particular field gave promise of a better informed, more equitable adjustment of the conflicting interests of price stabilization upon the one hand and producer consumption upon the other. * * *
>
> Where as here a determination has been left to an administrative body, this delegation will be respected and the administrative conclusion left untouched. Certainly a finding on Congressional reference that an admittedly constitutional act is applicable to a particular situation does not require such further scrutiny. Although we have here no dispute as to the evidentiary facts, that does not permit a court to substitute its judgment for that of the Director. * * * It is not the province of a court to absorb the administrative functions to such an extent that the executive or legislative agencies become mere fact finding bodies deprived of the advantages of prompt and definite action.
>
> * * * To determine upon which side of the median line the particular instance falls calls for the expert, experienced judgment of those familiar with the industry. Unless we can say that a set of circumstances deemed by the Commission to bring them within the concept 'producer' is so unrelated to the tasks entrusted by Congress to the Commission as in effect to deny a sensible exercise of judgment, it is the

Court's duty to leave the Commission's judgment undisturbed."

In the case at bar the legislature specifically clothed the Commission with the duty of determining the facts and the application of the statute to those facts. Section 5(d) provides for disqualification

> "For any week with respect to which *the Commission finds* that his total or partial unemployment is due to a labor dispute which is in active progress at the factory, establishment or other premises at which he is or was last employed; * * *."

The question whether a particular controversy constitutes a labor dispute, and whether that dispute is in active progress, and whether that dispute is at the factory of last employment, are all questions of the same character as whether a party is an employee, or a member of a crew, or a producer, or subject to "control." Whether they be called questions of fact, or mixed questions of law and fact, or questions relating to the application of broad statutory terms to particular facts—the established rule is that the administrative determination is binding if it has support in the evidence and a basis in reason.[8]

---

[8]State decisions construing statutes identical in substance to the Alaska Act are in accord.

Miners in General Group v. Hix (W. Va. Sup. Ct., 1941), 17 S. E. (2d) 810;

Department of Industrial Relations v. Pesnell (1940), 29 Ala. App. 528, 199 So. 720;

Ex parte Pesnell (1941), 240 Ala. 457, 199 So. 726 (cert. den., 313 U. S. 590), affirming *Department of Industrial Relations v. Pesnell* (1940), 29 Ala. App. 528, 199 So. 720;

Barnes v. Hall (1941), 285 Ky. 160, 146 S. W. (2d) 929.

II.

THE DETERMINATION OF THE ALASKA UNEMPLOYMENT COMPENSATION COMMISSION IS WARRANTED BY THE RECORD AND HAS A REASONABLE BASIS IN LAW.

A. The statute and the proceedings.

The preamble of the Alaska Unemployment Compensation Law provides:

> "*Declaration of Territorial Public Policy.*
>
> As a guide to the interpretation and application of this Act, the public policy of this Territory is declared to be as follows:
>
> Economic insecurity due to unemployment is a serious menace to the health, morals and welfare of the people of this Territory. Involuntary unemployment is therefore a subject of general interest and concern which requires appropriate action by the

---

Block Coal & Coke Co. v. United Mine Workers, Etc. (1941), 177 Tenn. 364, 148 S. W. (2d) 364;
Deshler Broom Factory v. Kinney (1942), 140 Neb. 889, 2 N. W. (2d) 332;
Latham v. State Unemployment Compensation Com'n (1941), 167 Ore. 371, 117 P. (2d) 971;
Dallas Fuel Co. v. Horne (1941), 230 Iowa 1148, 300 N. W. 303;
Walter Bledsoe Coal Co. v. Review Board, Etc. (Ind. Sup. Ct., 1943), 46 N. E. (2d) 477;
Sandoval v. Industrial Commission (1942), 110 Colo. 108, 130 P. (2d) 930;
In re North River Logging Co. (1942), 15 Wash. (2d) 204, 130 P. (2d) 64;
Johnson v. Pratt (1942), 200 S. C. 315, 20 S. E. (2d) 865;
Moore et al. v. Board of Review (C. C., W. Va., 1940), C.C.H. Unemployment Insurance Service (W. Va.), par. 1980.01;
New Jersey Board of Review Decision No. BR-52L, C.C.H. Unemployment Insurance Service (N.J.), par. 1980.03;
Pennsylvania Board of Review Decision No. B-44-6-RG-503, C.C.H. Unemployment Insurance Service (Pa.), pars. 1980.013, 1980.019.

Legislature to prevent its spread and to lighten its burden which now so often falls with crushing force upon the unemployed worker and his family. The achievement of social security requires protection against this greatest hazard of our economic life. This can be accomplished by encouraging employers to provide more stable employment and by the systematic accumulation of funds during periods of employment from which benefits may be paid for periods of unemployment, thus maintaining purchasing power and limiting the serious social consequences of poor relief assistance. The Legislature, therefore, declares that in its considered judgment the public good, and the general welfare of the citizens of this Territory, require the enactment of this measure, under the police power of the Territory, for the compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own."

The disqualification provision reads as follows:

"*Disqualification for Benefits.* An individual shall be disqualified for benefits:

* * * * * * * *

(d) For any week with respect to which the Commission finds that his total or partial unemployment is due to a labor dispute which is in active progress at the factory, establishment or other premises at which he is or was last employed; provided, that such disqualification shall not exceed the 8 weeks immediately following the beginning of such dispute; * * *"

The Commission determined that the unemployment of the respondents was due to a labor dispute which, during

the disqualification period, was in active progress at the establishment at which the respondents were last employed.[9]

---

[9]The Act provides that the Commission shall make an "Initial Determination" in all 5(d) cases upon evidence transmitted to the Commission by its examiner (Sec. 6(b)); that an appeal tribunal, consisting of a referee selected as provided in the Act (Sec. 6(d)), may affirm or modify the initial determination (Sec. 6(c)); and that finally, the Commission, whose determination is conclusive if supported by the evidence (Sec. 6(i)), may affirm, modify or set aside any decision of an appeal tribunal (Sec. 6(e)).

The initial determination of the Commission in this case is not included in the record but is referred to in the decision by the Referee (R. 608, et seq.) as follows:

> "• • • The claimants having been disqualified by an initial determination of the Unemployment Compensation Commission from receiving unemployment benefits for eight weeks on the ground that their unemployment was due to a labor dispute in active progress at the establishment at which they were last employed, under the provisions of section 5(d) of the Alaska Unemployment Compensation Act, the Alaska Commission appointed a Referee • • •."

See also Referee's opinion and decision (R. 634).

See also opinion of the District Court (R. 692, 694), where the Court said:

> "Their [respondents] claims were first considered by an Examiner of the Commission, who denied them benefits, except after the first eight weeks following the opening of the season at the canneries in question, under the provisions of Sec. 5(d) of the Alaska Unemployment Compensation Act, on the ground that 'their unemployment was due to a "labor dispute" in active progress at the establishment at which they were last employed.'"

The Referee subsequently overruled the Commission's initial determination on the sole ground that the dispute ceased to be in active progress on the deadline dates imposed by the employers (decision by Referee, R. 634, 641, et seq.).

Finally, the Commission overruled the Referee and sustained its initial determination, denying benefits to the claimants except after the first eight weeks following the opening of the season of the canneries in question.

See Commission's decision on appeal (R. 644, et seq.); see also opinion of District Court (R. 692, 694).

B. There was a labor dispute.

Respondents have vigorously protested, since the inception of this proceeding before the Commission, that there was no labor dispute within the meaning of the Act. In fact, this proposition was advanced as the foundation of the primary attack upon the respective determinations, all adverse to respondents, of the Examiner, the Commission itself, and the District Court.

The Act contains no definition of the term "labor dispute." The Commission in this case had no precedent or prior determination of the meaning of this term in this Act. Therefore, it was for the Commission to decide to give to the term a reasonable meaning consistent with the purposes of the Act. It had to choose between the very narrow definition of the term insisted upon by respondents, that the term referred only to strikes occurring on the premises which prevented the men from going to work, or the comprehensive definition of the term similar to that which is to be found in the Norris-LaGuardia Act (29 U.S.C., sec. 113(c)) or in the National Labor Relations Act (29 U.S.C., sec. 152(9)), wherein the term "labor dispute" is defined as including in general any controversy concerning terms or conditions of employment or concerning the association or representation of persons in negotiating, fixing, maintaining, changing or seeking to arrange terms or conditions of employment regardless of whether or not the disputants stand in the proximate relation of employer and employee. The Commission chose the latter, and that such construction is reasonable is evident from the record and also from the fact that a

similar conclusion has been reached by the courts of last resort of every state in which the question has arisen.[10]

The uncontradicted evidence shows that the respondents and the employers held a series of meetings in an attempt to reach a collective bargaining agreement covering the 1940 terms and conditions of employment for the fishing season in Alaska, and eventually failed to come to terms. It is respectfully submitted that the Commission in determining that the facts of the case establish the existence of a labor dispute applied a meaning to the term "labor dispute" quite rational and reasonable in every respect, and that it was well justified in rejecting the narrow definition of the term upon which respondents insisted.

C. The dispute was in active progress at the establishment at which respondents were last employed for the period of disqualification fixed by the Commission.

The Examiner, the Referee, the Commission, and the District Court were in full accord as to the eight weeks' disqualification of the respondents with respect to every issue raised in the proceedings, with the single exception that the Referee took the position that the active progress of the dispute ended when the employers' deadline had been reached. On this issue the Referee was reversed by the Commission, and the Commission was upheld by the District Court.[11]

---

[10] See cases cited in footnote 8, pp. 16 and 17, supra.

[11] The Act provides that the findings of the Commission if supported by evidence and in the absence of fraud shall be conclusive (Sec. 6(i)).

The Referee argued and respondents contend that when the employers notified the unions that if operations were to be carried on it would be necessary that agreements be reached with respect to Karluk by April 10, 1940, with respect to Chignik by April 12, 1940, and with respect to Bristol Bay by May 3, 1940, the disputes ended on such dates since no agreements were reached. That was the end of the matter, said the Referee. The dispute and all issues involved, to use his expressive language, became a "dead horse." The Referee conceded, of course, that the dispute had been in active progress, had "raged," as he put it, up to the date of these deadlines (R. 640). The Commission, on the other hand, held that a dispute existed, that it was in active progress, and that it continued beyond the deadlines and for the full term of the eight weeks' disability provision.

Again we have to consider whether the determination by the Commission as to the meaning and application of the term "in active progress" in this case was rational and proper. Certainly the term is not one of absolutely unvarying legal significance. The words "in active progress" were inserted in the statute to protect the workman from disqualification if the labor dispute were settled by such an agreement as prevented the employment of the claimant workman, as, for instance, where the settlement resulted in a closed shop, the applicant being nonunion, or, in recognition of a union of which claimant was not a member, or any other termination which left the claimant unemployed through no fault of his own. This is the clear meaning ascribed to the words by the Commission, and, being rational, is conclusive.

We respectfully submit that in addition to the reason above given, the Referee's analysis as to the proper application of the term is clearly erroneous.

First, there is a definite distinction between the dispute as such, i. e., the contest, the struggle, and the physical negotiations and acts of the parties done in carrying on the dispute; and second, there were in fact, in the case at bar, meetings and negotiations subsequent to the deadlines (R. 626-627, 84-86, 90-94, 98-100, 339-341).

At the time this brief is written there are a number of labor disputes in existence, with respect to many of which the parties are at a complete impasse. Ultimatums have been given. The offers of each antagonist have been unconditionally refused by the other. No further meetings are scheduled. In many instances the employees are on strike, in others, strikes have been threatened or strike dates have been set. No one believes, we respectfully submit, that these labor disputes are over, that they have been terminated, or that they are no longer in active progress. The fact that the parties, having given ultimatums, stand squared off glaring at one another does not establish the end of active progress. There is no evidence in the record that after the deadline set by the employers further discussions might not have resulted in going to Alaska for a limited season if an agreement had been reached, either because of concessions, changes in economic conditions or for any other reason. The record does show that the parties did meet in Seattle after the deadline dates and did discuss wages, the primary bone of contention (R. 626-627, 84-86, 90-94, 98-100, 339-341). The Commission did not have to decide as to the exact date

when the dispute ended, a problem which obviously the Referee found troublesome. The Commission did find in keeping with the obvious policy of the law that the dispute continued for the eight weeks' period. The Referee based his contrary conclusion in part upon his assumption that unless the dispute were held to have terminated on the deadline dates, the dispute, like Banquo's ghost, would continue indefinitely (R. 639). The legislature, however, specifically provided against the effect of any such possibility by limiting the term of the disqualification to a maximum of eight weeks.

Beyond this, all of the other evidence is consistent with the fact that the dispute was in active progress and as such continued through the season. The employers intended to operate and would have operated their plants in Alaska at all three locations. They offered respondents work. Respondents, through their collective bargaining agents, demanded higher wages and other terms of employment more favorable than the employers in good faith felt they could accept. Respondents refused to work under the conditions offered. Far from terminating on the date of this impasse, the dispute at that time ripened into open disagreement which continued through the season.

Clearly, this determination of the Commission is a rational one. When the statute speaks of a labor dispute in active progress, it means a labor dispute affecting the work at the plant. The dispute may be passive if the plant is operating, but if the dispute is such as to actually prevent the plant from operating, it is active—it is in active progress with respect to its effect on the plant. And it is in active progress at the plant if the effect of the

progress is to stop work at the plant. Thus, the dispute in stopping the work at the plant during the 1940 season did continue in active progress through the 1940 season at the plant at which the work was stopped.

A distinction must be drawn between a labor dispute and negotiations. The former can exist without the latter. As a matter of fact, negotiations are not an essential part of the labor dispute, rather they seek to put an end to the labor dispute.

This brings us to the second part of the clause which we are discussing which requires that the dispute must be in active progress "at the factory, establishment or other premises at which he is or was last employed; * * *." Not only the Examiner, the Referee, the Commission, and the District Court, but counsel for both petitioners and respondents assumed that this portion of the clause must necessarily refer to the plant or establishment affected by the dispute, and that, if the dispute involved the work at such establishment, it necessarily followed that the dispute was "at" the establishment within the meaning of the Act. Contrary contention arose for the first time in the decision of the Circuit Court of Appeals. That Court reversed the District Court on the ground that since neither of the parties, in speaking to each other with respect to the dispute, had actually been standing or sitting in the plants involved in the dispute, the disqualification could not apply. The Circuit Court of Appeals did not express any views on the question as to whether the contrary determination of the Commission was rational or irrational, whether it had warrant in the record or a reasonable basis in law, or whether the determination

of the Commission should in any respect be persuasive or controlling upon the Circuit Court of Appeals. We will discuss this decision later in our brief.[12]

We do wish to say here, however, that as between the determination of the Commission with respect to the meaning and application of this portion of the statute and the determination of the Circuit Court of Appeals with respect thereto, we respectfully contend that the determination of the Commission is rational and reasonable, and the determination of the Circuit Court of Appeals highly irrational and most unreasonable. The provision we are here considering is not unique to the Alaska Unemployment Compensation Law. It has been adopted in like or substantially similar language in the unemployment compensation laws of some forty-three states, the District of Columbia, and the Territory of Hawaii.[13] It is, we respectfully submit, unreasonable to assume that the legislatures of these states and territories and the Congress had in mind that an employee would be disqualified if unemployment resulted from a dispute argued out between the employer and the union negotiating committee in the front office of the plant but would not be disqualified if the argument took place in a hall, hotel room, or public meeting place across the street. No legislature could be oblivious to the fact that contract negotiations are, in the minority of instances, carried out within the fences of the plant itself. Generally, both the negotiating committee and the management prefer to

---

[12]See page 28, et seq.

[13]See citations of these statutes at pages 26-29 of the Petition for a Writ of Certiorari.

carry out these negotiations away from the plant so as not to disrupt the work of other employees. It is a common practice for negotiations to be carried on in a city far removed from the plant. How unfair it would be if the employees of General Motors, United States Steel or of the Anthracite Coal Industry would be free from disqualification simply because conditions require the meetings to be held in some metropolis away from any plant, while an equally deserving employee of some small industrial plant would be disqualified merely because the local union happened to carry out the negotiations with the management at the plant itself.

D. The respondents' unemployment was due to a labor dispute.

This contention is purely factual. Respondents contended that their unemployment was not "due" to the dispute because the employers did not negotiate in good faith but intended to, and did, abandon their operations for reasons other than the labor dispute (R. 29-30, 202-203, 204-205, 612). The Referee, the Commission in both its initial and final determinations, and the District Court all held against respondents. The Referee found: "There is no evidence to support the Union's contention that the Employers acted in bad faith in the course of the negotiations" (R. 628); "All operations contemplated by the Employers and the Union for 1940 were abandoned for the reason that a mutually satisfactory working agreement was not negotiated by the dates set by the Employers, as the 'dead line' for the respective districts * * *" (R. 633). The record is replete with evidence that the employers intended to sail, made all necessary prep-

arations to sail, and actually purchased quantities of gear as well as perishable supplies so that they could sail and conduct a fishing operation for the 1940 season (R. 530-536, 560-565). Any decision that respondents' unemployment was due to any cause other than a labor dispute would have been contrary to the evidence in the record (R. 530-576).

III.

THE GROUNDS UPON WHICH THE CIRCUIT COURT OF APPEALS BASED ITS DECISION ARE UNTENABLE.

The decision of the court below is in conflict with the applicable decisions of this Court, first, because it fails to recognize that the determination of the Commission should be followed if it is warranted by the administrative record and has a reasonable basis in law, second, because it is based on a volunteered point not raised before the Commission or before the District Court or included within the assignment of errors before the Circuit Court of Appeals, and third, because in failing to remand the case to the Commission the Court usurped the function of the Commission.

A. The decision fails to recognize that the determination of the Commission should be followed if it is warranted by the record before the Commission and has a reasonable basis in law.

We have heretofore established the clear principle that the function of a reviewing court with respect to a determination of a commission charged with the administration of a statute is to ascertain whether the interpretation

placed upon the terms of the statute and the application of such terms is fairly warranted from the record before the commission and has a reasonable basis in law. Unless the statutory term has an absolutely unvarying legal significance it is for the administrative body to determine the definition of such term as well as its application, and this determination, so long as it stays within the bounds of reasonableness is conclusive.

The Circuit Court of Appeals without so much as referring to the rule or discussing the reasonableness of the Commission's determination takes it upon itself to decide that, since neither the employers nor the respondents nor any of their respective agents were physically located within the limits of the canneries in Alaska at the time the negotiations for a collective bargaining agreement were conducted, the dispute was not in active progress at the plant or establishment at which respondents were last employed.

We have heretofore commented upon the unreasonableness of this interpretation and, conversely, the reasonableness of the interpretation given this provision by the Commission (supra, pp. 26-27).

The phrase "dispute * * * in active progress at the factory" does not have an "absolutely unvarying legal significance."[14] A dispute may be in progress "at" a plant if negotiations are in progress on the actual plant premises, but it may also be in progress "at" a plant if the work stoppage arising out of the dispute continues

[14] *South Chicago Co. v. Bassett* (1940), 309 U. S. 251, 258, supra.

at the plant while negotiations to end it are being conducted across the street, or at any other place at the convenience of the negotiators. It may be in progress "at" all of several plants owned by the same employer although active disputation takes place only at one,[15] or it may be in progress "at" all of several plants owned by several employers while negotiations are conducted by common bargaining agents at one of the plants or elsewhere. All of these are familiar situations.

As pointed out by Judge Healy, the construction given the statute by the Court below "distorts the statutory policy and ignores the actualities of this seasonal operation" (R. 792). Men for the Alaska fishing operations are hired each year at San Francisco, Portland and Seattle. They return to these cities each year and live there. Many unions are involved in the whole Alaskan operations. Their headquarters, their officers, are in San Francisco, Portland and Seattle. For more than forty years—since prior to 1901—negotiations concerning working conditions for the Alaskan fishing and canning season have been carried on every year at San Francisco; for some of these years at Seattle. Agreements must be reached before the opening of the season. Negotiations must occur when it would be impracticable, if not impossible, to be in Alaska. It is a matter of judicial knowledge that Bristol Bay is icebound during the winter; inaccessible by boat. Except for planes which now fly in on skis, the only way to reach the plants in winter is by dog team

[15] See: *Chrysler Corporation v. Smith* (1941), 297 Mich. 438, 298 N. W. 87.

through the arctic night. Karluk and Chignik on the southern side of the Alaska Peninsula can be reached by boat, but no scheduled ships ever call there in winter and it would be nearly as difficult to arrange for off-season labor negotiations there as at Bristol Bay. Further, under the decision of the Circuit Court of Appeals it would be necessary, if one union were the bargaining agent for all of the men, to go from plant to plant and re-enact the dispute before the statutory disqualification would apply.

The Court's theory as to the meaning of the statute becomes more difficult to support when reference is made to the returning vessels carrying the men back from Alaska as the last place of employment. As the decision now stands, it is far from clear whether the disqualification, which is obviously intended to serve a real purpose in the statute, applies only if the negotiations pertaining to the dispute are carried on at the cannery in Alaska or whether they must be conducted with respect to each employee on the deck of the particular vessel in which such employee returned.

If the opinion is subject to the interpretation that the place of last employment is the vessel itself, then a new set of problems exist which make the application of the disqualification provision impractical. Not only were a number of vessels employed in bringing the respondents to and from Alaska, but different employers owned different vessels. It so happened that the vessels in which these particular respondents sailed were severally owned by the employers, but there are many vessels which take

employees to Alaska, which are chartered for that purpose for the fishing or mining season, and which are not available to the employer or the employees as a bargaining spot when negotiations commence for the following season. With respect to vessels owned by the employer, they are often chartered by the employer during the off-season so that during the course of negotiations these vessels are often not available as a bargaining place. To interpret the statute as applying the disqualification only in the event negotiations were conducted on the deck of each vessel which carried during the preceding season employees involved in the dispute would defeat the very purpose of the section and reduce it to an utter absurdity. Furthermore, the application of such a doctrine in labor disputes involving other industries would produce incongruous results. If in order for the disqualification to apply the dispute negotiations must be conducted at the point or place of last employment, the disqualification might apply to a group of employees with the exception of some favored few who by chance might have been away from the factory at the time the strike started or the employment terminated. An employee who was sent off the premises to pick up tools or to deliver merchandise or to get supplies might thus, by sheer accident, be entitled to the full benefit of the statute when his less favored coworker would be disqualified. It certainly, we respectfully submit, was not the purpose of the statute to achieve any such result as this. Thus the rationality of the Commission's construction of the disqualification provision is impressive.

The decision not only ignores these actualities of Alaskan seasonal operations, but also the actualities and history of American labor relations in general. Unions frequently and fairly demand "neutral grounds" for the settlement of disputes. Numerous negotiations—certainly many of the most important—are conducted by representatives of all workers in many widely-separated plants under different managements. The negotiations between the United Mine Workers and the coal operators in 1939, carried on by John L. Lewis and others at New York and Washington and referred to in the decisions hereinafter cited,[16] are familiar examples.

So far as our research discloses, the exact point upon which the Circuit Court of Appeals based its decision has been raised in only one case, *Koski, et al. v. UCC, et al.*, C.C.H. Unemployment Insurance Service, Oregon, par. 8046, where is was characterized by the Court as "ridiculous" and unworthy of serious consideration. The Court said:

> "There remains the question as to whether this labor dispute is one which under the statute constitutes a disqualification barring these claimants from unemployment compensation. Counsel for plaintiff urges that it is not. Counsel's theory is that Section 126-705, O.C.L.A., excludes this conclusion by the provision that the labor dispute must be one 'in active progress at the factory, establishment or other premises' in or on which the employee works; and counsel argues that any dispute which existed did not take place upon the premises of these employers.

[16] Page 34, infra.

> This argument cannot be taken seriously by the Court, and evidently was not by the Commission. If the interpretation given by counsel is to be applied to the statute, it would result in the admittedly ridiculous situation where any kind of labor dispute could be carried on without disqualifying the men from getting unemployment compensation, provided only the disputants kept off the real property of the employer. This could not have been the intention of the Legislature, and in the opinion of this Court the statute must be interpreted as meaning a dispute which affects the wages, hours or conditions of labor at the factory, establishment or other premises involved, regardless of where the disputing is done."

The decision of the court below is also in conflict with *Block Coal & Coke Co. v. United Mine Workers, Etc.* (1941), 177 Tenn. 364, 148 S. W. (2d) 364; *Miners in General Group v. Hix* (W. Va. Sup. Ct., 1941) 17 S. E. (2d) 810; *Dallas Fuel Co. v. Horne* (1941), 230 Iowa, 1148, 300 N. W. 303; *Department of Industrial Relations v. Pesnell* (1940), 29 Ala. App. 528, 199 So. 720 (affirmed, *Ex Parte Pesnell* (1940), 240 Ala. 457, 199 So. 726, cert. den., 313 U. S. 590); *Sandoval v. Industrial Commission* (1942), 110 Colo. 108, 130 P. (2d) 930; *Walter Bledsoe Coal Co. v. Review Board, Etc.* (Ind. Sup. Ct., 1943), 46 N. E. (2d) 477; *Moore et al. v. Board of Review* (C. C., W. Va., 1940), C.C.H. Unemployment Insurance Service (W. Va.), par. 1980.01.

All of these cases arose out of the dispute in 1939 between United Mine Workers of America and the operators of coal mines in the various states. In each case

there was a stoppage of work pending negotiation of contracts. Negotiations were carried on by John L. Lewis and his associates, and by the representatives of the operators, in New York City and Washington, D. C. In all cases claims for unemployment compensation were filed and ultimately denied under the labor dispute disqualification provisions of the several acts—all identical with the provision in the Alaska Act. While the exact point decided by the court below was not raised by any of the employees,[17] its decision was necessarily involved since the negotiations occurred "at" New York and Washington and not "at" the various mines. The construction given to the statutory provision by the courts in each of these cases is illustrated by the following quotation from the *Block Coal & Coke Co.* case (148 S. W. (2d), p. 366):

> "The dispute was wholly with respect to matters relating to such labor, and we are unable to reach any other conclusion than that a labor dispute was in active progress throughout the period here involved touching the continuance or resumption of work at the premises at which each of these claimants 'was last employed.'"

The decision below is important to the Unemployment Compensation Commission of Alaska and to the Territory of Alaska. As the Referee pointed out (R. 642):

> "The Referee is conscious of the fact that his conclusion, if sustained by the Commission or the Court, will mean the practical exhaustion of the Unemployment Compensation fund of the Territory
> * * *"

[17] We suggest this point was not raised because of its unsubstantial character.

Beyond this, the decision if unreversed will seriously handicap all labor negotiations relating to Alaskan industries, particularly seasonal industries.[18] Employers will be reluctant to negotiate seasonal contracts at any place but at their respective plants in Alaska, notwithstanding the fact that during the months when negotiations must take place the plants are closed and virtually inaccessible, and the workers and employers are in the United States. This burden, great on the employers, will fall even more heavily on the workers. The creation of such a situation is unwarranted and defeats the purposes of the Act.

But the decision has more than local significance. It is a precedent of nationwide application in the important field of labor relations, and in a portion of that field closely integrated with federal law. Under the sponsorship of the Congress, through Title IX of the Social Security Act (49 Stat. 620, 639),[19] forty-three states, the District of Columbia, and the Territory of Hawaii have enacted unemployment compensation acts containing labor dispute disqualification provisions identical to the provisions of Section 5(d) of the Alaska Act here involved.[20] The decision below—bearing the authority of the only Federal Circuit Court of Appeals ever likely to pass upon the point—is a direct precedent as to the con-

---

[18]These include not only the fishing and canning operations—the largest single industry in Alaska, but also among others, the important placer mining industry.

[19]Now incorporated in the Internal Revenue Code, 26 U.S.C. 1600-1611.

[20]See citations of these statutes at pages 26-29 of the Petition for a Writ of Certiorari.

struction of all of these statutes. The administration of each of these acts is financed in part by the Federal Government and is a matter of direct concern to the Federal Government. The decision of the court below is a precedent impairing labor relations and impeding the settlement of labor disputes throughout the nation. Employers and employees will be seriously handicapped in their efforts to negotiate on netural ground, or at points of common convenience, or at one common place where disputes involve more than one plant.

B. The Circuit Court of Appeals erred in reversing the District Court and the Commission upon a ground not raised before the Commission, the District Court or the Circuit Court of Appeals.

There is the further point, however, that the single issue upon which the Circuit Court of Appeals reversed the District Court and the Commission was not available to respondents before that Court, for the reason that it had never been urged at any time before in any of the proceedings, including those in the Circuit Court of Appeals—in fact, the converse to the conclusion reached by that Court had been conceded by respondents time and time again.

Without deciding any of the points actually urged by respondents, the Circuit Court of Appeals reversed the judgment on the sole ground that the dispute was not at the factory or establishment at which respondents were last employed. This argument proceeded on the premise that the place of last employment was either shipside in San Francisco, where the respondents left their respective ships on their return from the 1939 operations, or at the

plants or establishments in Alaska where they were engaged in the canning of fish in 1939. The evidence, of course, clearly showed that the negotiations of the parties were held at neither of these places but were in fact held in San Francisco and in Seattle, places chosen for that purpose by the parties to the dispute.

The decision goes to some lengths to establish that the issue as to place of dispute was properly before the Circuit Court of Appeals and that it had been raised below on numerous occasions by the respondents. The quotations in the opinion of the Circuit Court of Appeals of instances represented as places where the point was raised, upon an examination of the record, will be found to be merely instances where the statutory language happens to have been used in the assertion of one or another of the questions actually raised.[21]

An examination of the record, particularly the portions quoted below, will establish the development of the case through the Commission and the District Court and the objections, grounds for review, and assignments of error which the respondents made to the determinations of these tribunals.

The first proceeding which appears in the record is the hearing before the Referee appointed for the purpose of taking testimony by the Alaska Unemployment Compensation Commission (R. 25). The hearing took place in San Francisco and commenced on June 17, 1940. This hearing was upon objections to the initial determination of the applicants' claims for benefits by the Alaska Unem-

[21] See Petition for Writ of Certiorari herein, pp. 11-15.

ployment Compensation Commission (R. 608, 634), "* * * The claimants having been disqualified by an initial determination of the Unemployment Compensation Commission from receiving unemployment benefits for eight weeks on the ground that their unemployment was due to a labor dispute in active progress at the establishment at which they were last employed, under the provisions of section 5 (d) of the Alaska Unemployment Compensation Act * * *" (R. 608).

The Referee found and determined, first, that from the date of the commencement of the fishing season in 1940 until the date of the respective deadlines "a labor dispute was in active progress with reference to the operation" of the particular plant at which the employee was last employed, but, second, that the dispute ended at the deadline dates. Accordingly he directed that benefits to the deadline dates be denied, but that benefits after such deadline dates should be awarded (R. 642-643).

From this determination, the employers appealed but respondents did not (R. 645). On appeal the Commission reversed the decision and conclusion of the Referee and allowed benefits in accordance with the Commission's initial determination (R. 644-649), thus determining that an active labor dispute existed at the opening of the season at the plants at which the respondents respectively were last employed, and that such dispute continued at such places for the eight weeks' disqualification period, that is to say, at the Karluk Cannery for eight weeks after April 5th, at the Chignik Cannery for eight weeks after April 1st, and at the Bristol Bay Cannery for eight weeks after

May 5th, said eight weeks being in addition to the regular two weeks waiting period (R. 648-649).

Against this determination, respondents filed a petition for review (R. 650-672) on the grounds (1) that petitioners were not disqualified on account of any labor dispute in active progress within the meaning of Section 5(d) of the Act (R. 654); (2) that the Commission erred in finding that negotiations were in active progress at the opening of the season (R. 656); (3) that a "labor dispute" did not exist between the parties (R. 660); (4) that the determination that there was "an *active* labor dispute existing between the parties at the *opening of the season*" was erroneous (R. 660-662); and (5) that the conclusion of the Commission that "the dispute *continued*" was erroneous (R. 662).

In this connection and in this petition for review respondents took the position and conceded:

> "Therefore, if there was a dispute, it ended at Karluk on April 10, 1940, and at Chignik on April 12, 1940, and applicants last employed in 1939 in plants at those areas are not disqualified after those dates that the dispute was not in 'active' progress.
>
> With regard to Bristol Bay, the dispute ended on May 3, 1940 two days before the season opened" (R. 665).

This was always the position of the respondents from the inception of the case to and including the oral argument before the Circuit Court of Appeals. Respondents always contended that there was no labor dispute, that it was not in active progress after the deadline dates, and

that the unemployment was not due to the dispute. At no time did they contend that the dispute was not at the plant or establishment at which respondents were last employed.

The District Court, on respondents' petition for review, upheld the Commission (R. 719). In its findings of fact, the Court found:

> "9. That the labor dispute which was in progress long before the opening dates for fishing and canning as hereinabove set forth, existed and was in active progress at the Chignik, Karluk and Bristol Bay canneries during the entire season as defined by the Commission.
>
> 10. That the unemployment of claimants in the 1940 fishing and canning season, and the whole thereof, was due to a labor dispute existing between the employers, the respondent companies herein, and the claimants, and that this labor dispute was in active progress at the cannery at which they were respectively last employed, and there was an active labor dispute between the claimants and the respondent employers during the entire canning season as defined by the Commission at the respective canning plants at Chignik, Karluk, and various points in Bristol Bay, Alaska" (R. 716).

In its conclusions of law, the District Court held:

> "1. The Claimants were not unemployed 'through no fault of their own,' but were unemployed because they were unwilling to accept employment offered them. The claimants were unemployed due to a labor dispute which was during the entire fishing and canning season of 1940 as defined by the Commission in active progress at the factory, establishment or other premises at which they were last employed" (R. 717).

On appeal to the Circuit Court of Appeals respondents directed the following assignments of error to findings Nos. 9 and 10:

"V.

That finding No. 9 made by the District Court is not supported by the evidence in the following respects:

(1) No labor dispute existed within the meaning of the Alaska Unemployment Compensation Law.

(2) Admitting for the sake of argument that a labor dispute existed at one time, it did not exist and was not in active progress at the Chignik, Karluk and Bristol Bay canneries during the entire season as defined by the Commission, but said labor dispute was in active progress at Chignik only from April 1, 1940, to April 12, 1940, and terminated on April 12, 1940, and was not in active progress at Chignik during the balance of the 1940 season; that said labor dispute was in active progress at Karluk only from April 5, 1940, to April 10, 1940, and terminated on April 10, 1942, and was not in active progress at Karluk during the balance of the 1940 season; that at the commencement of the season at Bristol Bay no labor dispute was in active progress, and no labor dispute existed with respect to the Bristol Bay operations at any time during the 1940 season.

VI.

That Finding of Fact No. 10 made by the District Court is not supported by the evidence adduced before the Referee and the Commission in that the unemployment of applicants and appellants during the 1940 season was not due to a labor dispute existing between applicants and appellants on the one hand and respondent companies on the other; and admitting for the sake of argument that a labor dispute existed at

one time, said labor dispute was not in active progress during the said 1940 season in the plants where applicants were respectively last employed, but said labor dispute, if any, terminated at Chignik on April 12, 1940 and terminated at Karluk on April 10, 1940, and was not in existence at all at Bristol Bay during the 1940 Bristol Bay season" (R. 724-726).

With respect to conclusion of law No. 1, respondents directed the following assignment:

"X.

That Conclusion of Law No. 1 made by the District Court is in error and contrary to law in that applicants and petitioners were not unemployed because they were unwilling to accept employment offered them or because of a labor dispute which was in active progress during the entire 1940 Alaska salmon packing season but, on the contrary, said applicants and appellants were unemployed during the said 1940 season because respondent companies failed and refused to employ applicants and failed and refused to enter into a collective bargaining agreement with the Union of which applicants were and are members. That said Conclusion of Law is contrary to and not supported by the evidence in that the evidence shows that if a labor dispute existed, it terminated at Chignik on April 12, 1940, at Karluk on April 10, 1940 and was not in existence at all at Bristol Bay during the said 1940 season, and therefore applicants and appellants were entitled to benefits accordingly" (R. 728-729).

The conclusion is irresistible that the dissenting opinion of Judge Healy is correct in asserting that the point and the sole point upon which the majority opinion relies was

never advanced by the respondents in this action or by anyone until it appeared in the decision of the Circuit Court of Appeals.

C. In any event, the function of the Circuit Court of Appeals in this case is limited to returning the case to the Commission for further proceedings.

The Alaska Act imposes upon the Commission the administration of the Act and the determination of the validity of claims presented thereunder, subject only to "review" in the courts after administrative remedies have been exhausted. Even if the Circuit Court of Appeals were correct (and we respectfully submit it was not) in holding that the Commission's findings do not conclusively determine that the dispute was in active progress "at" the plants in Alaska, its action in remanding with direction to enter a final order is still erroneous, for it denies the Commission the opportunity to make any determination, initial or otherwise, of the important point involved. The decree remands with direction to enter a final order. The Commission is wholly deprived of the power, in a matter of exceptional importance, to exercise its function of determining the appropriate application of the Act.

See

Phelps Dodge Corp. v. Labor Board (1941), 313 U. S. 177, 196-197;

Regal Knitwear Co. v. Board (1945), 324 U. S. 9, 13.

In the *Phelps Dodge* case this Court said:

"The administrative process will best be vindicated by clarity in its exercise. Since Congress has defined the authority of the Board and the procedure by which it must be asserted and has charged the federal courts

with the duty of reviewing the Board's orders (§10(e) and (f)), it will avoid needless litigation and make for effective and expeditious enforcement of the Board's order to require the Board to disclose the basis of its order. We do not intend to enter the province that belongs to the Board, nor do we do so. All we ask of the Board is to give clear indication that it has exercised the discretion with which Congress has empowered it. This is to affirm most emphatically the authority of the Board."

The Alaska Act further provides that the Commission shall determine the manner in which disputed claims shall be presented. Its rule in this regard is clear from its decision herein. It held that since respondents took no objection or appeal from the findings of the Referee, they were bound by his ruling (R. 645). The same rule applies to the point made the basis of the decision below. The entire administrative scheme is frustrated if questions as to the application of the statute to particular facts are taken from the hands of the expert administrative tribunal charged with its administration. In usurping the administrative function of the Commission, the decision of the Circuit Court of Appeals is in conflict, not only with the decisions of this Court stating accepted limitations upon judicial review, e.g.,

Helvering v. Wood (1940), 309 U. S. 344, 348-349;
Denver Stock Yard Co. v. U. S. (1938), 304 U. S. 470, 484-485; and
U. S. v. Northern Pacific Ry. Co., 311 U. S. 317, 370-372,

but also with the decisions of this Court cited earlier on pages 13-16 of this brief.

CONCLUSION.

It is respectfully submitted that the judgment of the Circuit Court of Appeals should be reversed.

Dated, San Francisco, California,
February 1, 1946.

Respectfully submitted,

E. COKE HILL,
Attorney for Alaska Unemployment Compensation Commission.

MARSHALL P. MADISON,
FRANCIS R. KIRKHAM,
MELVIN E. MENSOR,
H. L. FAULKNER,
Attorneys for Alaska Packers Association, Alaska Salmon Company and Red Salmon Canning Company.

(Appendix Follows.)

Appendix

ALASKA UNEMPLOYMENT COMPENSATION LAW.

(Chapter 4, Extraordinary Session Laws of 1937, as amended by Chapters 1 and 51, Session Laws, 1939)

Be it enacted by the Legislature of the Territory of Alaska:

DECLARATION OF TERRITORIAL PUBLIC POLICY. As a guide to the interpretation and application of this act, the public policy of this Territory is declared to be as follows:

Economic insecurity due to unemployment is a serious menace to the health, morals and welfare of the people of this Territory. Involuntary unemployment is therefore a subject of general interest and concern which requires appropriate action by the Legislature to prevent its spread and to lighten its burden which now so often falls with crushing force upon the unemployed worker and his family. The achievement of social security requires protection against this greatest hazard of our economic life. This can be accomplished by encouraging employers to provide more stable employment and by the systematic accumulation of funds during periods of employment from which benefits may be paid for periods of unemployment, thus maintaining purchasing power and limiting the serious social consequences of poor relief assistance. The Legislature, therefore, declares that in its considered judgment the public good, and the general welfare of the citizens of this Territory, require the enactment of this measure, under the police power of the Territory, for the compulsory setting aside of unemployment reserves to be used

for the benefit of persons unemployed through no fault of their own.

* * * * * * *

Section 2. DEFINITIONS. * * *

(c) * * * provided, however, that if an individual has earned wages only in a seasonal industry, his claim shall not be valid until the beginning of the claimant's next recurring seasonal period.

* * * * * * *

Section 3. BENEFITS. * * *

(c) As used in this subsection the term "seasonal industry" means an occupation or industry in which, because of the seasonal nature thereof it is customary to operate only during a regularly recurring period or periods of less than one year in length. The Commission shall, after investigating and hearing, determine, and may thereafter from time to time redetermine, the longest seasonal period or periods during which, by the best practice of the occupation or industry in question, operations are conducted. Until such determination by the Commission no occupation or industry shall be deemed seasonal.

(d) * * *

(2) Notwithstanding the foregoing provisions of the subsection, seasonal wage credits shall be available only with respect to weeks of unemployment occurring in whole or in part within the longest seasonal period (as determined pursuant to subsection (c) of this section) of the industry from which they were earned.

The term "seasonal wage credits" means wage credits based upon wages for employment by employers earned from a seasonal industry during the longest seasonal period, as determined by the Commission pursuant to subsection (e) of this section.

* * * * * * *

Section 5. DISQUALIFICATION FOR BENEFITS. An individual shall be disqualified for benefits:

* * * * * * *

(d) For any week with respect to which the Commission finds that his total or partial unemployment is due to a labor dispute which is in active progress at the factory, establishment or other premises at which he is or was last employed; provided, that such disqualification shall not exceed the 8 weeks immediately following the beginning of such dispute;

* * * * * * *

Section 6. CLAIMS FOR BENEFITS.

* * * * * * *

(b) "Initial Determination." An examiner designated by the Commission shall take the claim. An initial determination thereon shall be made promptly and shall include a determination with respect to whether or not benefits are payable, the week with respect to which benefits shall commence, the weekly benefit amount payable, and the maximum duration of benefits. In any case in which the payment or denial of benefits will be determined by the provisions of section 5(d) of this Act, the examiner shall promptly transmit all the evidence with respect to that subsection to the Commission. The Commission, or such representative as it may designate for such purpose,

shall, on the basis of the evidence so submitted and such additional evidence as it may require, make an initial determination with respect thereto. An initial determination may for good cause be reconsidered. * * *. The claimant or any party to the determination may file an appeal from such initial determination * * *.

(c) "Appeals." An appeal tribunal, after affording the parties reasonable opportunity for fair hearing, shall unless such appeal is withdrawn affirm or modify the findings of fact and initial determination. The parties shall be duly notified of such tribunal's decision, together with its reasons therefor, which shall be deemed to be the final decision of the Commission, unless within ten days after the date of notification or mailing of such decision, further appeal is initiated pursuant to subsection (e) of the section.

(d) "Appeal Tribunals." To hear and decide disputed claims, the Commission shall appoint one or more impartial appeal tribunals consisting in each case of a referee, selected in accordance with Section 11(d) of this Act. No person shall participate on behalf of the Commission in any case in which he is an interested party.

(e) "Commission." The Commission may on its own motion affirm, modify, or set aside any decision of an appeal tribunal on the basis of the evidence previously submitted in such case, or direct the taking of additional evidence, or may permit any of the parties of such decision to initiate further appeals before it. The Commission shall permit such further appeal by any of the parties to a decision of an appeal tribunal, and by the ex-

aminer whose decision has been overruled or modified by an appeal tribunal. The Commission may remove to itself to transfer to another appeal tribunal the proceedings on any claim pending before an appeal tribunal. Any proceeding so removed to the Commission shall be heard by a quorum thereof in accordance with the requirements of subsection (c) of this Section. The Commission shall promptly notify the parties to any proceedings of its findings and decision.

(f) "Procedure." The manner in which disputed claims shall be presented and the conduct of hearings and appeals shall be in accordance with regulations prescribed by the Commission for determining the rights of the parties, whether or not such regulations conform to common law or statutory rules of evidence and other technical rules of procedure. A full and complete record shall be kept of all proceedings in connection with a disputed claim. All testimony at any hearing upon a disputed claim shall be recorded unless a written stipulation to the contrary is signed by both parties and filed with the examiner, but need not be transcribed unless the disputed claim is further appealed.

* * * * * * *

(h) "Appeal to Courts." Any decision of the Commission in the absence of an appeal therefrom as herein provided shall become final thirty days after the date of notification or mailing thereof, and judicial review thereof shall be permitted only after any party claiming to be aggrieved thereby has exhausted his administrative remedies as provided by this Act. The Commission shall be deemed to be a party to any judicial action

involving any such decision, and may be represented in any such judicial action by any qualified attorney employed by the Commission and designated by it for that purpose, or at the Commission's request by the Attorney General.

(i) "*Court Review.*" *Within thirty days after the* decision of the Commission has become final, any party aggrieved thereby may secure judicial review thereof by commencing an action in the United States District Court against the Commission for the review of such decision, in which action any other party to the proceeding before the Commission shall be made a defendant. * * * In any judicial proceeding under this Section, the findings of the Commission as to the facts, if supported by evidence and in the absence of fraud, shall be conclusive, and the jurisdiction of said court shall be confined to questions of law. * * * An appeal may be taken from the decision of the United States District Court as is provided in civil cases.

* * * * * * *

Section 11. ADMINISTRATION.

(a) "Duties and Powers of Commission." It shall be the duty of the Commission to administer this Act; and it shall have power and authority to adopt, amend, or rescind such rules and regulations, to employ such persons, make such expenditures, require such reports, make such investigations, and take such other action as it deems necessary or suitable to that end. Such rules and regulations shall be effective upon publication in the manner not inconsistent with the provisions of this Act, which the Commission shall prescribe. The Commission shall determine its own organization and methods of procedure in

accordance with the provisions of this Act, and shall have an official seal which shall be judicially noticed. * * *

(b) "Regulations; General and Special Rules." General and special rules may be adopted, amended, or rescinded by the Commission only after public hearing or opportunity to be heard thereon, of which proper notice has been given. General rules shall become effective thirty days after filing with the Secretary of the Territory and publication in one newspaper of general circulation in each of the four judicial divisions of the Territory for such period as the Commission may prescribe. Special rules shall become effective thirty days after notification to or mailing to the last known address of the individuals or concerns affected thereby. Regulations may be adopted, amended, or rescinded by the Commission and shall become effective in the manner and at the time prescribed by the Commission.

* * * * * * *

(e) "Advisory Councils." The Commission shall appoint a Territorial advisory council and may appoint local or industry advisory councils, composed in each case of an equal number of employer representatives and employee representatives who may fairly be regarded as representative because of their vocation, employment or affiliations, and of such members representing the general public as the Commission may designate. Such councils shall aid the Commission in formulating policies and discussing problems related to the administration of this Act and in assuring impartiality and freedom from political influence in the solution of such problems. Such advisory councils shall serve without compensation, but shall be reimbursed for any necessary expense.